THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
FEBRUARY 2017 AT A GLANCE
BY MITCHELL I GOLDING, ESQ.
KENNEDY, CAMPBELL, LIPSKI & DOCHNEY
(W) 215-861-6709

COLLATERAL ESTOPPEL/ HEART AND LUNG ACT

- The granting of Heart and Lung benefits following a hearing did not preclude the WCJ from granting the medical aspect of claimant's Claim Petition but suspending the indemnity aspect because the governing procedure and the amount at controversy differ in a Heart and Lung claim when compared to a Workers" Compensation claim.
  To employ the precept of collateral estoppel in a workers' compensation proceeding following a Heart and Lung determination, there must be a two-part inquiry into the amount at risk and the governing procedure.

  The amount at risk – The amount at risk in a Heart and Lung claims differs from what is at risk in a workers' compensation claim. This is because Heart and Lung benefits cease when the claimant's disability is determined to be permanent. The absence of a specified time limit does not transform the temporary nature of Heart and Lung benefits into lifetime benefits. This means benefits under the Heart and Lung Act are temporary, i.e., until the claimant returns to work or is found to be permanently disabled, but benefits under the Workers' Compensation Act may last a claimant's lifetime.

  The temporary nature of Heart and Lung benefits, as opposed to potential lifetime benefits under the Workers' Compensation the Act, renders the amount in controversy between the two schemes incomparable.

  Governing procedure- The governing procedure in a Heart and Lung case differs from the governing procedure in a Workers' Compensation Case. The Heart and Lung Act requires an arbitration proceeding that is more ad hoc and informal when compared to a proceeding governed by the Workers' Compensation Act. This is most notable with regard to the standards for the admission of medical evidence and the level of detail required in a WCJ's decision.

- Collateral estoppel, also known as issue preclusion, prevents relitigation of questions of law or issues of fact that have already been litigated in a court of competent jurisdiction. The doctrine of collateral estoppel is based on the policy

that a losing litigant does not deserve a rematch after fairly suffering a loss in adversarial proceedings on an issue identical in substance to the one he subsequently seeks to raise.

Collateral estoppel will foreclose relitigation of issues of fact or law in subsequent actions where the following criteria are met: (1) the issue in the prior adjudication is identical to the one presented in the later action; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; (4) the party against whom collateral estoppel is asserted has had a full and fair opportunity to litigate the issue in the prior action; and (5) the determination

Merrell v. WCAB (Commonwealth of Pennsylvania Department of Corrections) No. 493 C.D. 2016 (Decision by Judge Leavitt, February 6, 2017) 2/17

SUBROGATION

- The employer was only entitled to subrogation against claimant's third party recovery that was based upon the portion of its lien that resulted from the third party tortfeasors negligence. This means employers subrogation was limited to the compensation it paid to Claimant for the work injuries caused by the third party defendant's negligence

  This is because to establish its right to subrogation, the employer must demonstrate that it was compelled to make payments due to the negligence of a third party and that the fund against which the employer seeks subrogation was for the same compensable injury for which the employer is liable under the Act.

  This is consistent with the language of Section 319 that states:

  > Where the compensable injury ***is caused in whole or in part by the act or omission of a third party***, ***the employer shall be subrogated to the right of the employe***, his personal representative, his estate or his dependents, against such third party ***to the extent of the compensation payable under this article by the employer***…

  Therefore the employer was not entitled to subrogation for portion of its lien that related to its payment of disfigurement benefits and medical bills resulting from injuries sustained to claimant's hands, neck, face and head, trachea, larynx, and lungs because those specific injuries resulted from the work gloves and air supplied face shield that were not manufactured or supplied by the third party tortfeasor.

Serrano v. WCAB (Ametek, Inc.), No. 2684 C.D. 2015 (Decision by Judge Leavitt, February 13, 2017) 2/17

COURSE AND SCOPE

- Claimant suffered an injury in the course and scope of employment pursuant to the special circumstances exception of the going and coming rule where he was on call and was home sick but nevertheless drove to wok to respond to an emergency at the request of his employer and during his drive to work he was involved in a motor vehicle accident resulting in injuries.

  This is because when Claimant was on call, Employer did not treat it as part of Claimant's shift or some extension of his regular shift; rather, Claimant received "comp time" and but for the emergency, Claimant would not have made the trip to work. The fact that Claimant was sick and would not otherwise have come to work brought his accident within the special circumstances exception.
  Further, the fact that the employer paid the claimant "door to door," and he was on the clock from the moment he left his house, was alone sufficient to support application of the exception to the "coming and going rule."

- Generally, for an injury sustained in a commute to or from work, disability is not compensable, with four recognized exceptions: (1) the employment contract includes transportation to and/or from work; (2) the claimant has no fixed place of work; (3) the claimant is on a special assignment or mission for the employer; or, (4) ***special circumstances*** are such that the claimant was furthering the business of the employer.

  "***Special circumstances***" have rendered compensable an injury sustained during a commute where: (1) the employee is requested by the employer to come in; (2) the request is for the convenience of the employer or in furtherance of its business; and (3) the trip is not simply for the convenience of the employee.

  Further, the request by the employer can be direct or express, on the one hand, or implied, on the other, to qualify as a special request by the employer.

  In this matter the Claimant acted in accordance with his "on call "responsibilities in attempting to make his way to work to address an emergency at Employer's request

Lutheran Senior Services Management Company v. WCAB (Miller), No. 1074 C.D. 2016 (Decision by Judge McCullough, February 15, 2017) 2/17

EMPLOYER/EMPLOYEE/ CONSTRUCTION WORKPLACE MISCLASSIFICATION ACT (CWMA)

- For an employee to be covered by the Construction Workplace Misclassification Act (CWMA) the construction activity must be analyzed and considered in the context of the putative employer's industry or business.
  The claimant was not covered by the CWMA and was not an employee of the defendant where the where the defendant was a restaurant business and not a construction business.

- The CWMA applies to individuals who performed services in the construction industry and affects the determination of who is an independent contractor versus an employee under the WC Act.
  The dispositive question to determining if one falls within the purview of the CWMA is whether the individual is performing services for remuneration "in the construction industry."

  The CWMA was intended to limit those who would be deemed independent contractors, as opposed to employees, and was intended to address concerns that some employers were misclassifying workers as independent contractors, rather than employees, in order to avoid things such as payment of unemployment taxes and workers' compensation premiums.

  The CWMA did not apply in this matter because the employer was not engages in the construction industry but was rather a restaurant that hired the clamant to engage in remodeling.

- The most important factor to consider upon determining whether if a claimant is an employee or independent contractor is control over the work to be completed and the manner in which it is to be performed are the primary factors in determining employee status. Moreover, it is the existence of the right to control that is significant, irrespective of whether the control is actually exercised. Where one reserves no control over the means of accomplishing a contract but merely reserves control as to the result, the employment is an independent one establishing the relation of contractee and contractor and not that of master and servant.

  In this matter the claimant was not an employee where the defendant was a restaurant and not a construction business. The claimant was hired to perform remodeling. Claimant did not expect to work in the restaurant after the remodeling. Moreover, the restaurant owner had no construction or remodeling experience and credibly testified that he did not know anything about construction. A reasonable person could conclude that the owner was in charge of what needed to be done in a manner similar to that of property owners and specialists, such as painters, plumbers, etc.

Department of Labor and Industry, Uninsured Employers Guaranty v. WCAB(Lin and Eastern Taste), No. 627 C.D. 2016 (Decision by Judge Hearthway, February 17, 2017) 2/17

REASONED DECISION/ REMAND/ CAPRICIOUS DISREGARD/EXPERT TESTIMONY

- Section 422(a) of the Act, which addresses the requirement to provide a reasoned decision, states in part:

  Uncontroverted evidence may not be rejected for no reason or for an irrational reason; the workers' compensation judge must identify that evidence and explain adequately the reasons for its rejection.

  The requirement that the WCJ adequately explain his reasons for accepting or rejecting evidence protects the parties to a decision by ensuring that a legally erroneous basis for a finding will not lie undiscovered. The WCJ's prerogative to determine the credibility of witnesses and the weight to be accorded evidence has not been diminished by the amendments to Section 422(a). Such determinations are binding on appeal unless made arbitrarily and capriciously.

  In providing an adequate basis for appellate review, the WCJ is not required to address all of the evidence presented in a proceeding in her written adjudication. Instead, to satisfy the "reasoned decision" requirement, a WCJ must only make findings necessary to resolve the issues raised by the evidence and relevant to the decision.

- Expert medical testimony is not rendered incompetent merely because it is premised upon the expert's assumption of the truthfulness of information, unless that information is not proven by competent evidence or is rejected by the WCJ.

  In this matter the WCJ did not capriciously disregard claimant's medical expert, though her was the only medical expert to testify, where she rejected the claimant as not credible.

- A WCJ must restrict her decision on remand to the instructions within the remand order. However, the WCJ is not required to produce the same result as the initial decision.

Green v. WCAB No. 383 C.D. 2016 (US Airways) (Decision by James Gardner Colins, Decided February 24, 2017) 2/17